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IN THE

Supreme Court of the United States

OCT. Term, 1965

No. 1038

ROBERT C. GRASBERGER, Trustee in Bankruptcy
RICHARD J. HILL, Objecting Creditor,
Petitioners

v.

LOUISE C. CALISSI, Executrix of the Estate of PAUL C. CALISSI, deceased, as a general creditor, and PAUL CALISSI, ROBERT CORSINI, RAYMOND CORSINI and LOUISE C. CALISSI, as priority and general creditors,
Respondents

In the matter of: Calpa Products Company, Bankrupt

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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LOUISE C. CALISSI, Executrix of the Estate of PAUL C. CALISSI, deceased, as a general creditor, and PAUL CALISSI, ROBERT CORSINI, RAYMOND CORSINI and LOUISE C. CALISSI, as priority and general creditors,

Respondents

In the matter of: Calpa Products Company, Bankrupt

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Robert C. Grasberger, Trustee in Bankruptcy, of Calpa Products Company, Bankrupt, and Richard J. Hill, an objecting creditor, appellants in the Court below, pray for the grant of a Writ of Certiorari for review of the final decree of the Court of Appeals for the Third Circuit, entered in this case on December 21, 1965.

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet reported in the official reports. A copy of that Opinion is appended hereto as Appendix "A". The Opinion of the District Court, which was adopted by the Court of Appeals, has not yet been reported. It appears in the Appendix filed in the appeals in the Court below. (pp. 99a to 108a) It is dated March 5, 1965. It was filed March 9, 1965.

A certified transcript of the record in the case, including the proceedings in the said Court of Appeals for the Third Circuit, is furnished herewith, in accordance with Rule 21 of the rules of your Honorable Court.

JURISDICTION

The decree of the Court of Appeals for the Third Circuit sought to be reviewed is dated and entered December 21, 1965.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, as amended (28 U.S.C.A., Sections 1254, 1257, 2103 and 2106.)

QUESTIONS PRESENTED

1. Is the decision of the Court of Appeals of the Third Circuit, in this case, in conflict with the mandate of the Bankruptcy Laws of the United States, U.S.C.A. Title 11, Bankruptcy, particularly Sections 11(2), 93(a)(g), 104(5) and 107(a)(1)(a)(b) and 107(b) and in conflict with the applicable decisions of this Court and Courts of Appeals of other circuits on the same questions?

2. (a) Does a Bankruptcy Court, under Sec. 57(g) of the Bankruptcy Act, Title 11, Bankruptcy, U.S.C.A. 93(a) and (g), requiring that claims of creditors, who have

received or acquired preferences or a lien, void or voidable under this Act, be not allowed unless such creditors shall surrender such preferences, have jurisdiction to determine the issue and disallow such claims, where objections are made thereto, based, inter alia, that such preferences have been received by such creditors and the preferences arise in the same transactions upon which the proofs of claim are based?

(b) Did not the claimants, filing such claims in bankruptcy, submit themselves to the exclusive jurisdiction of the Bankruptcy Court to fully adjudicate any voidable preference?

3. (a) Are claims of creditors, who are the sole stockholders and officers of the bankrupt corporation, not subject to rigid scrutiny and are they put to the added burden not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the entire community of interests in the corporation—creditors as well as stockholders?

(b) Is not the essence of the test in such claims whether or not, under all the circumstances, the transaction carries the earmarks of an arm's length bargain? If it does not meet these tests will not equity set it aside?

4. May a Bankruptcy Court allow a claim as a priority for rent when it is based upon a distraint for rent, allegedly made, and not upon the priority set forth in the Bankruptcy Act, Sec. 64(5), U.S.C.A., Title 11, Sec. 104(5)?

5. When objections are made to a claim, inter alia, based upon the bar of the Statute of Limitations, may the Bankruptcy Court allow that part of the claim, which, on its face and by the testimony of the claimant, is beyond the statute of limitations?

6. May a Referee in Bankruptcy and, thereafter, by affirmance of the District Court and the Court of Appeals,

support the allowance of a claim based upon testimony which did not exist and did not appear in the record?

7. May a District Court affirm the allowance of proofs of claim in bankruptcy, without taking testimony, de novo, where it held that the proofs of claim are not self-sustaining, by finding proof of the disputed claims in the proofs of claim, themselves, and basing the allowance of a disputed claim upon the bankrupt's auditors' reports, admitted in evidence, over objection, where such auditors did not appear and testify and who were not subject to cross-examination?

8. May a Bankruptcy Court find proof of the existence of the consideration of a disputed claim based upon speculation and not upon probative facts?

9. Where proofs of claim, to which objections have been filed, are held to be not self-sustaining and, on their face, fail to comply with the requirements of proof of the allowance of claims, as set forth in U.S.C.A., Title 11, Bankruptcy, Sec. 93(a), Bankruptcy Act, Sec. 57(a), is not the burden of proving such claims upon the claimants?

10. Was it not grievous eror for the Court to treat the oaths of the Executrix of a decedent's estate, who, in that capacity, filed a proof of claim in the Bankruptcy Court, but, who, in the court having jurisdiction of the adjudication of the decedent's estate, did not set forth the existence of such a claim in her first and final account filed in that court as a question of disputed testimony and not a question of a false oath in one proceeding or the other?

11. May a Bankruptcy Court disregard an objection to disputed claims that the claimants are, in fact, the true debtors and that the corporate veil of the bankrupt corporation be pierced, on the ground that it had no jurisdiction to consider that question at the time of the hearing on the objections to the disputed claims?

12. May the Court allow a general claim by the sole stockholders and officers of a bankrupt corporation after finding that loans upon which the claim is based were capital investments in the corporation by these same claimants?

STATUTE INVOLVED

Bankruptcy Act, Sec. 2(a)2, Title 11 Bankruptcy, U.S.C.A., Sec. 11(a)(2)

> "Sec. 2 Creation of Courts of Bankruptcy and Their Jurisdiction. a.
>
> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;"

Bankruptcy Act, Sec. 57(a) and 57(g), Title 11 Bankruptcy, U.S.C.A., Sec. 93(a) and 93(g)

> "Sec. 57. Proof and Allowance of Claims. a. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim, the consideration therefor; whether any and, if so what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim."

Bankruptcy Act, Sec. 64a, (5), Title 11, Bankruptcy, U.S.C.A., Sec. 104(a)(5)

> "Sec. 64. Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of

bankrupt estates, and the order of payment shall be * * *"

"(5) debts owing to any person, including the United States, who by the laws of the United States in * entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: Provided, however, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

* So in original

Bankruptcy Act, Sec. 67a(1) (a) (b), Title 11 Bankruptcy, U.S.C.A., Sec. 107(a) (1) (a) (b).

"Sec. 67. Liens and Fraudulent Transfers. a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act:"

STATEMENT OF THE CASE

Petitioners are the Trustee in Bankruptcy and a creditor of Calpa Products Company, Bankrupt. Objections were filed by a creditor to the allowance of claims of Paul A. Calissi, Robert Corsini, Raymond Corsini and Louise C. Calissi, claiming priority as a rent claim of $2,400.00, and a general claim of $5,771.26, and of Louise C. Calissi, Executrix of the Estate of Paul C. Calissi, Deceased, as a gen-

eral creditor, of $54,919.79. The Trustee in Bankruptcy joined in these objections.

The respondents are the claimants, whose claims were filed in the Bankruptcy Court. These claims were allowed by the Referee. A Petition for Review was taken to their allowance. The District Court affirmed. Consolidated appeals were taken by Robert C. Grasberger, Trustee in Bankruptcy, and Richard J. Hill, Objecting Creditor, as Appellants.

The basis for federal jurisdiction in the court of first instance is the Bankruptcy Act, Sec. 2.a.(2), (11 U.S.C.A., Sec. 11(2).

Petition in involuntary bankruptcy was filed against the bankrupt on May 15, 1963. (1a) The bankrupt corporation was the successor to a business organized in 1923 by Paul C. Calissi (now deceased) followed by a partnership formed by him and two trusts created by him for the benefit of two minor sons. The partnership took the form of a corporation in November, 1959, all the stockholders being members of the family of Paul C. Calissi. (41a, 99a) Paul C. Calissi died in January, 1955, leaving his estate, including the stock in the corporation and, among other assets, real estate at 5420 Paschall Avenue, Philadelphia, Pennsylvania, to his widow, Louise C. Calissi, his son, Paul A. Calissi and his two stepsons, Robert and Raymond Corsini. Louise C. Calissi was named Executrix of his estate. (22a, 99a) The Orphans' Court of Delaware County had jurisdiction of and administered the Estate of Paul C. Calissi, deceased. (52a, 99a)

The respondents, the claimants in the two proofs of claim are the sole stockholders, officers and directors of the bankrupt corporation. (22a, 104a) They were such when the transactions in question arose. (22a, 57a, 58a)

In the bankruptcy proceedings a general claim was filed by Louise C. Calissi, as Executrix of the Estate of Paul C. Calissi, deceased, in the sum of $54,919.79. (7a, 10a) In that same proceedings a claim for rent was filed by Paul A.

Calissi, Robert Corsini, Raymond Corsini and Louise C. Calissi, in the sum of $8,171.26. Of this, priority was claimed in the sum of $2,400.00, based upon a distraint for rent, and the balance of the claim as a general claim. In the proof of claim filed for rent no details of the alleged distraint are set forth as to when made, what was levied upon, the value of the merchandise or assets levied upon, or what was realized from the sale of the assets, so distrained. (3a-6a)

At the time of the death of Paul C. Calissi he owned the majority of the shares of stock of the bankrupt corporation and, inter alia, the parcel of real estate located at 5420 Paschall Avenue, Philadelphia, Pennsylvania. The bankrupt conducted its business there from 1952 to the time of bankruptcy. (22a)

The objections to the allowance of both claims had in common that the claimants were the sole stockholders, officers and directors of the bankrupt corporation; that they had given themselves a preference against or over other creditors; that each claim on its face, was not self-sustaining; that the corporation was but the alter ego of its stockholders and officers, the claimants, and was so from its inception; that they are individually and jointly liable as partners for all the debts of the bankrupt; that the corporate veil be pierced. At all times during the existence of this corporation, its founder and the claimants were the sole stockholders, officers and directors of the corporation. (1a to 19a)

In addition, the objections to the rent claim were that the claimants, owners of the real estate wherein the business of the bankrupt corporation was conducted, being the sole stockholders and officers of the bankrupt, did not, in good faith, cause a distraint for rent to be made upon the assets of the bankrupt (12a); that there is no priority based upon a distraint for rent, as such, under the bankruptcy laws (13a); and that, neither as a priority or a general claim, is this claim allowable under the facts of this case. These objections required rigid scrutiny of both claims.

In addition, the objections to the general claim of $54,-919.79 demanded proof that such moneys were paid into the corporation, when, and by whom, and, further, if any moneys were due to the Estate of Paul C. Calissi at the time the alleged note was created it was at a time when it was barred by the statute of limitations (17a, 18a). The objections questioned whether the claim was, in fact, but the capital contribution of Paul C. Calissi and, later, of the claimants, to the corporation (18a); that Louise C. Calissi, Executrix of the Estate of Paul C. Calissi, deceased, did not include as an asset of the estate a debt due it by Calpa Products Company, when she filed her First and Final Account as Executrix of that estate, sworn to on March 16, 1962, under oath, in the Orphans' Court of Delaware County, Pennsylvania, which had jurisdiction of that estate, but it did show the ownership of the shares of stock of the bankrupt corporation. (18a)

One hearing was held upon the objection of these claims. (37a-97a) At the outset of the hearing on objection to the general claim, the Referee ruled the claim was not self-supporting and the claimant was put to the burden of proof of the claim. (39a, 40a) The claimant accepted this burden without objection. In an attempt to meet this burden the claimant offered the testimony, solely, of Paul A. Calissi. (40a to 77a)

At the end of the testimony on objections to the general claim the attorney for the Trustee and the attorney for the rent claimants stipulated that the evidence offered in support of the general claim would be the same in support of the rent claim in every respect. (76a, 77a)

This witness was 16 years of age at the time of his father's death in 1955. He became president of the corporation in 1960 when he was 21 years of age. (43a)

Over objection, he testified of a debt due by the corporation to his father. His father died in January, 1955. At that time the witness had no connection with the business of the corporation. Further, that a loan was made by

the estate to the corporation around September, 1961. (41a) He stated, "We were in difficulty and we mortgaged the building we were in, which is owned by the estate, and we lent the money to the corporation." (44a) "The loan was close to $40,000.00." (44a) Allegedly, a lease for the use of that property, 5420 Paschall Avenue, Philadelphia, Pennsylvania, was entered into between the four claimants, the sole heirs of Paul C. Calissi, deceased, and the corporation on or prior to April 1, 1960. The rent claim is based upon it. (3a) The bankrupt made payments on account of this mortgage loan of $564.00 a month for twenty (20) months (a total of $11,280.00). This included principal of the mortgage debt, interest, taxes due on that property and miscellaneous charges. (83a) The witness testified that on the date of bankruptcy the loan due to the mortgagee and secured by the property in question had been reduced to $34,992.79. (45a, 83a)

Over objection he testified of a further loan of $15,000.00. The heirs, being all the stockholders and officers of the bankrupt, personally guaranteed the loan. (69a, 70a) The bankrupt paid this loan to the bank. (70a, 71a)

Under date of October 31, 1954, a closing entry of the bankrupt's journal reads, "Loans, Paul C. Calissi, Notes receivable $30,000.00 (68a) There is no testimony that this debt due to the bankrupt by Paul C. Calissi was repaid.

Over objection, the Referee admitted into evidence copies of written statements prepared by accountants for the bankrupt. The accountant who prepared these statements for the bankrupt was not present, did not testify, under oath or otherwise, and was not subject to cross-examination nor was an opportunity offered to the adverse parties to cross-examine the author of these statements. (47a, 48a, 49a, 50a, 73a, 84a to 97a)

The witness was confronted with a certified copy, under the great seal of the Orphans' Court of Delaware County, Pennsylvania, of the First and Final Account and Adjudication of the Estate of Paul C. Calissi, deceased, as

filed in that court, sworn to on March 16, 1962 by Louise C. Calissi, as Executrix of that estate. (52a, 53a) That account was approved and an adjudication entered by that court in May of 1962. This witness, president of the bankrupt corporation, and an heir of his father's estate, admitted that there was not included in the final account any indebtedness due to the estate of Paul C. Calissi, deceased, by the bankrupt corporation. (53a, 54a) There was no debt listed of a deferred liability of $44,755.00 (53a, 54a) which was set forth in the objected to and admitted Exhibit B-3 (89a).

He admitted that the loan of $15,000.00, allegedly made by the estate to the bankrupt prior to the date of the account, was not listed in the Executrix's First and Final Account. (54a)

The Referee ruled, "Whether or not it is a preferential payment is not before the Referee". (71a) This over objection of counsel for the objecting creditor.

The Referee several times ruled that the question of preferential payments made by the officers and stockholders to themselves, the claimants and beneficiaries of both the general claim and the rent claim, was not before him and that he did not have jurisdiction to consider or rule upon that question. (62a, 64a, 71a, 73a, 77a, 79a)

The Referee ruled the alleged loans "were in the nature of capital investments" and "are capital investments and, as such, the loan will be subordinated to the rights of all general creditors . . .". (76a)

At the close of the claimant's testimony the objecting creditor offered in evidence the certified copy of the first and final account and adjudication of the Estate of Paul C. Calissi, deceased. The Referee, denying its admission, stated; "That has served its purpose." (80a) The Referee then ruled that counsel for the objecting creditor, who had been conducting the examination, had no right to object. (72a) The Referee ruled that the Trustee did not have to put in any evidence (75a), then allowed the general claim but declared it be subordinated to the right of all general creditors. (75a)

Other than the stipulation that the factual situation relative to the claimants and their identity with the bankrupt was the same as presented in support of the general claim, there was no further testimony offered in support of the rent claim. The Referee allowed the rent claim, originally, in the sum of $8,171.26 and denied it the status of a priority creditor, but in his Opinion, dated May 26, 1964, allowed it as a rent priority in the sum of $2,400.00 and a general unsecured claim of $5,771.26. (23a, 79a, 80a) The objections to the allowance of the two claims were dismissed. (23a)

The Referee, in his findings, based the allowance of the general claim of $54,919.79, solely, upon a purported verification "by the Court-appointed auditor, Milford M. Myers," showing "an amount due to the Estate of $55,164.48 and, as this evidence was uncontradicted." (22a) There was no testimony by Mr. Myers. He did not take the stand, nor did he submit a report at the hearing on these objections. No such report was offered or admitted in evidence. It is not a part of the record.

Petitions for Review were filed by the objecting creditor, who had conducted the examination. (16a, 25a). The claimants filed Petitions for Review solely on the question of subordination of these claims. (103a)

The District Court did not take testimony, de novo, upon the Petitions for Review.

The District Court, in its Opinion, which has been adopted as the Opinion of the Court of Appeals, referred to the general claim by the Executrix of the Estate of Paul C. Calissi, deceased, as one "For loans made to the bankrupt by decedent during his lifetime and by the estate after his death," stating, "These loans were allegedly evidenced by a promissory note." (100a) The Opinion further states the claimants (naming them) as owners of the real estate, 5420 Paschall Avenue, Philadelphia, Pennsylvania, "filed a proof of claim for rent, asserting priority for three months' rent totalling $2,400, and a general claim for the balance

of rent due in the amount of $5,771.26. The claim for rent was pursuant to an alleged written lease." (100a) That Opinion further stated, "Notwithstanding the affidavits, the Referee ruled that the claims were not self-supporting and additional evidence was adduced by the claimants." (101a, 102a)

The District Court held the general claim representing loans to the bankrupt was sufficiently proved, adding "In addition to the proof of claim and the accompanying affidavit hereinabove referred to, there was testimony by Paul A. Calissi that such loans were in fact made, and audit reports prepared by bankrupt's accountants reflected all such loans." (102a) That court then stated, "The argument that claim No. 77 was not proved is based in large measure upon the fact that an account of adjudication filed by the Executrix, Louise C. Calissi, in the Orphans' Court of Delaware County, contained no reference to the loans. This evidence was before the Referee for his consideration. In determining that the disputed claim was satisfactorily proved, he obviously resolved the disputed testimony in favor of the claimants." (102a) In finding that the claim for rent was sufficiently proved the court stated, "In addition to the proof of claim itself and the accompanying affidavit explaining the destruction of the written lease, it is uncontradicted that the decedent and thereafter the claimants were the owners of the property in which the corporate bankrupt conducted its business. Those circumstances furnished sufficient corroboration that a lease agreement in fact had been entered into. There is no evidence to the contrary." (103a)

In spite of the objections filed to the allowance of these claims, based upon the fact that the claimants were the sole stockholders and officers of the bankrupt corporation, the court ignored the added burdens of proof then placed upon such claimants. Similarly, it adopted the position of the Bankruptcy Court that it did not have jurisdiction to adjudicate the questions of preferences made in the same transactions out of which these claims arose or that the

alleged loans were in fact contributions to capital and that the corporate veil be pierced. The president of the bankrupt testified, in answer to the question of the corporation's insolvency "* * * *because we put this money into the company which kept it solvent.*" (Emphasis supplied) (58a) The Referee found these loans to be capital investments. (76a) Nevertheless, the claim was allowed.

Appeals were taken by the Trustee and the objecting creditor from the allowance of these claims. The Court of Appeals for the Third Circuit, adopted the opinion of the lower court and affirmed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. In order that there be uniform administration of the Bankruptcy Laws, the scheme and purpose of which is that all creditors receive the equality of treatment, which it is the purpose of the Bankruptcy Act to afford, it is submitted rulings and decisions that violate such scheme is a basis for consideration by the Supreme Court on a Petition for a Writ of Certiorari.

Katchen, Petitioner v. Landy, Trustee, etc., ——U.S. ——, 86 S. Ct. 467, ——L. Ed. ——.

United States v. Speers, Trustee, 379 U.S. 958, 86 S.Ct. 411, 414, 13 L.Ed 2d 553. (Dec. 1965)

Stone et al. v. Eacho, 127 F.2d 284, 288 (C.A. 4).

2. A Bankruptcy Court sits as a court of equity with jurisdiction to sift the circumstances surrounding any claim to see that injustice and unfairness is not done in the administration of the bankrupt estate. This was not done in this case.

Katchen, Petitioner v. Landy, Trustee, etc., (supra.)

Central States Corp. v. Luger, 215 F.2d 38 (C.A. 10)

In re Laskin, 316 F.2d 70, 75, 76 (C.A. 3)

3. The claimants, in both disputed claims, are all the stockholders and officers of the bankrupt corporation. They offered no proof, as such fiduciaries, that the transactions surrounding these claims made by them to show the good faith and fairness of the transaction and to meet the essence of the test of whether or not, under all the circumstances, the transactions carried the earmark of an arm's length bargain.

Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281;

Hopper v. American National Bank of Cheyenne, Wyoming, 309 F.2d 244 (C.A. 10, 1962);

In re Kansas City Journal-Post Co., 144 F.2d 791 (C.A. 8);

Braddy v. Randolph, Jr., Trustee, etc., 352 F.2d 80, 84 (C.A. 4);

Bankers Life & Casualty Corp. v. Kirtley, Trustee, etc., 338 F.2d 1006, 1010 (C.A. 8)

4. In the proper administration of the Bankruptcy Laws the Bankruptcy Court is under compulsion to act upon the allowance or disallowance of claims when objections to their allowance is made because of preferential payments received by the claimants and such preferences have not been surrendered. The claimants have submitted themselves to the jurisdiction of the Bankruptcy Court by having filed these claims before it. The Referee found such preferences to exist, but he found that he did not have jurisdiction to consider that issue. The District Court and the Court of Appeals, erroneously, adopted this legal conclusion. This reason, alone, it is submitted, gives a basis to this Court to grant the petition for Writ of Certiorari. The uniform administration of the Bankruptcy Laws requires it. The mandate of the Bankruptcy Act should not be ignored.

11 U.S.C.A., Sec. 93(g), U.S.C.A., Title 11, Bankruptcy, Sec. 93(g), Sec. 57(g) of the Bankruptcy Act. (14 Ed. Collier on Bankruptcy, Vol. 2, Sec. 23.08 (523.06)6;

Katchen, Petitioner v. Landy, Trustee, etc., ——U.S. ——, 86 S. Ct. 467, —— L. Ed.——.

Katchen, et al. v. Landy, Trustee, 336 F.2d 535, 536 (C.A. 10);

Interstate National Bank of Kansas City v. Luther, Trustee, 221 F.2d 382 (C.A. 10)

5. The ignoring of the objection and the existence of the bar of the statute of limitations to the grant of a claim is in conflict with the findings and decisions of the Supreme Court of the United States that such statute of limitations is primarily designed to assure fairness to defendants (equally, creditors and Trustees in bankruptcy) and, further, the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 1054, 13 L.Ed. 2d 941.

6. The finding of the existence of a claim based on reports of the bankrupt's auditors, who did not testify, which were offered and admitted in evidence, over objection, without the sanctity of oath of the author of such reports, and without affording the adversary the right to cross-examine, violates the decisions of the Supreme Court of the United States and every known court in the United States, which your petitioner has been able to ascertain.

Petition of Soyer, 229 F.2d 805, 809, cert. denied, 76 S.Ct. 1025, 351 U.S. 966, 100 L.Ed. 1486;

Rudisill v. Cordes, 333 Pa. 544, 5 A.2d 217, 219; 31A C.J.S., Sec. 192, 193;

98 C.J.S., Sec. 368B, Witnesses (pp. 114, 116);

In re Shenandoah Suburban Bus Lines, Inc., 355 Pa. 521, 50 A.2d 301, 305;

Otney v. United States, 340 F.2d 696, 699, 700 (C.A. 10);

Cannady v. United States, 351 F.2d 796, 798 (U.S.C.A., D.C.)

Dereweki v. Pennsylvania Railroad Co., 353 F.2d 436, 442 (C.A.3—Dec. 1, 1965)

7. The allowance of a general claim made by the Executrix of the Estate of the founder of the bankrupt business, under whose Will the sole stockholders and officers of that corporation were the beneficiaries, after a finding that the loans upon which the claim was based are capital investments, is in conflict with the purpose of the Bankruptcy Act and is in conflict with decisions of Courts of Appeals of other circuits.

Braddy v. Randolph, 352 F.2d 80, 82 (C.A. 4)

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

The questions decided by the Court of Appeals of the Third Circuit are of national importance and of great value to the public. They reflect conflicting decisions on what appears to be similar facts and issues concluding with widely different results.

The Bankruptcy Act is national in scope. "Section 57. * * * Subsection g forbids the allowance of a claim when the creditor has 'received or acquired preferences * * * void or voidable under this title' absent a surrender of the preference. Bankruptcy Act, Sec. 57, sub. g, 11 U.S.C. Sec. 93, sub. g. (1964 ed.)" *Katchen v. Landy*, supra at 473. The decision of the Third Circuit tends to permit a distribution of the bankrupt's estate, in violation of the Bankruptcy Act, particularly Sec. 2(a) (2) and the mandate of Sec. 57(g) of that Act. This since the filing of a claim in bankruptcy operates to invoke the Bankruptcy Court's exclusive juris-

diction to sift the circumstances surrounding any claim and allow or disallow it, according to equitable precepts. It operates to invoke the Court's jurisdiction to fully adjudicate a question of a void or voidable preference, arising in the same transactions upon which the claim is based. The scheme of the Act that all creditors receive equality of treatment was violated in the allowance of a claim, purportedly based on part of the claim of a debt due a decedent, when the record clearly shows that the decedent was indebted to the bankrupt at the time of his death. There was no evidence that that indebtedness was repaid. Any claim that this decedent might have had was barred by the statute of limitations.

Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 1054, 13 L.Ed. 2d 941

Katchen, Petitioner v. Landy, Trustee, etc., (supra) at 471, et seq.

The decision of the Court of Appeals for the Third Circuit, adopting the Opinion of the District Court, directly conflicts with the decisions of this Court and courts throughout the United States, including its own decision, that proof of such claims may be found on hearsay evidence, when its probative force depends upon the competency and credibility of some person other than the witness and which testimony is not under oath and subject to cross-examination.

Petition of Soyer, 229 F.2d 805, 809 (Cert. denied), 76 S.Ct. 1025, 351 U.S. 966, 100 L.Ed. 1486

Otney v. United States, 340 F.2d 696, 699, 700 (C.A. 10)

Cannady v. United States, 351 F.2d 706, 798 (U.S.C.A., D.C. 1965)

"The purpose of the hearsay rule is to prohibit the use of such *unsworn, uncross-examined testimony* as substantive evidence in a case." (Emphasis supplied)

Dereweki v. Pennsylvania Railroad Co., 353 F.2d 436, 442 (C.A. 3, Dec. 1965)

Claimants, being the sole stockholders, officers and directors of the bankrupt corporation, are fiduciaries. Their dealings with the corporation are subject to rigorous scrutiny. Where their contracts with the corporation were challenged, the burden is on the directors or stockholders not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. This includes the interest of all its creditors.

The Opinion of the Court of Appeals for the Third Circuit, adopting the Opinion of the District Court as its own, is in conflict with the decision of the Supreme Court and of Courts of Appeal of other circuits.

Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281;

Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 323, 59 S.Ct. 543, 83 L.Ed. 669;

In re Kansas City Journal-Post Company, Inc., 144 F.2d 791 (C.A. 8);

Bankers Life & Casualty Corp. v. Kirtley, Trustee, etc., 338 F.2d 1006 (C.A. 8, 1964);

Hopper v. American National Bank of Cheyenne, Wyoming, 309 F.2d 244 (C.A. 10, 1962);

Braddy, Appellant v. Randolph, Jr., Trustee in Bankruptcy, etc., 352 F.2d 80, 84 (C.A. 4)

The allowance of a claim based upon a purported report of an accountant, not offered or admitted in evidence or made part of the record, was erroneous and would lead to an improper administration of the Bankruptcy Laws of the United States. The accountant's report was not admitted or offered in evidence, it is not a part of the record.

Osborne v. United States of America, 351 F.2d 111, 115

Sawyer v. United States, 112 U.S. App. D.C. 381, 303 F.2d 392, 395

The Referee based his allowance of the general claim of $54,919.79 on an alleged statement contained in a Report of the court appointed accountant. This, although no such report was ever offered, admitted in evidence or made a part of the record. Such a finding was erroneously based upon testimony that did not exist. The Court of Appeals adopts not only such a basis for allowance of this claim but, while the Referee ruled the proofs of claim were not self-supporting, nevertheless, found proof of the claims in the proofs, themselves, and in audit reports prepared by bankrupt's accountants. This in spite of the objection to the admission of such reports that the accountants did not testify, were not under oath, were not subject to cross-examination and such statements are hearsay evidence. Their probative force depends upon the competency and credibility of some person other than the witness.

The Circuit Court in this case departed from its own decisional law. That Court, in *Dereweki v. Pennsylvania Railroad Co.*, 353 F. 2d 436, at p. 442 stated:

> "We realize that the right of cross-examination inheres in every adversary proceeding and that it is established beyond any necessity for citation of authorities, with certain exceptions not pertinent here, that if cross-examination of an available witness is not had the litigant, deprived of cross-examination, has been denied due process of law."

This as late as December 1, 1965.

It was the obligation of the appellate court to overrule the clearly erroneous findings of the District Court. There was no evidence to support that finding.

A finding based upon such purported testimony, in one part which did not exist and, in the other part, on a

finding induced by an erroneous view of the law, is not binding on an appellate court.

Associated Press v. Taft-Ingalls Corp., 340 F. 2d 753, 765 (C.A. 6)

"The Courts must, of course, set aside . . . decisions which rest on an erroneous legal foundation."

N.L.R.B. v. Babcock and Wilcox Co., 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975.

The allowance of the rent claim was based upon no evidence. The District Court found its support in the proof of claim and that the decedent and, thereafter, the claimants, were the owners of the property in which the corporate bankrupt conducted its business. "Those circumstances furnished sufficient corroboration that a lease agreement in fact had been entered into." (103a) This conclusion was mere speculation. It may not be substituted for proof. The requirement is for probative facts capable of supporting, *with reason*, the conclusion reached in the verdict.

Noel v. United Aircraft Corporation, 342 F. 2d 232, 239 (C.A. 3)

Sharon Herald Co. v. Granger, 195 F.2d 890, 895 (C.A. 3)

The moves of the sole stockholders and officers, the claimants in these proofs of claim, lead to the inevitable conclusion they had not acted in good faith and for the best interests of the bankrupt and its creditors. The moves included the creation of an alleged promissory note "on or about September 1, 1962" in their favor, for a debt, allegedly due the decedent prior to January, 1955, when the bar of the statute of limitations had run; when the books of the bankrupt evidenced a debt due it from the decedent as late as October 31, 1955; the payments by the bankrupt, acting under the control of these claimants, to the date of

bankruptcy, because of a mortgage debt, secured by a property belonging either to the Calissi estate or to the individual stockholders, claimants, totalling approximately $11,000.00, while payments were not made to true creditors of the corporation; giving credit in reduction of that note of only $2,330.21; the sudden creation of a lease between them and their corporation on April 1, 1960, after occupancy of the same premises since 1952, at a rental not shown to be bargained at arm's length, the alleged distraint for rent claimed to be caused to be made by them on the assets of their corporation, the continued use of the assets, so distrained by the lessors, until bankruptcy; payments of rent to themselves when other creditors were not paid, the repayment of a loan allegedly made to the corporation by a bank, for the payment of which loan each of the stockholders was personally liable, while general creditors of the bankrupt were not paid. All these moves without even a semblance of any corporate action taken scream out their bad faith.

Pepper v. Litton (supra)

Braddy v. Randolph (supra)

"A sufficient basis for rejecting the claim of an officer, director or stockholder may be simply the violation of the rules of fair play and good conscience of a breach of the standard of conduct which an officer or director in his fiduciary capacity owes the corporation, its stockholders and creditors. Pepper v. Litton, supra, at 310, 311, 60 S. Ct. 230."

Braddy v. Randolph, 352 F. 2d 80, 84 (C.A. 4, 1965)

The Court found it had no jurisdiction to pass upon the question whether the separate entity of the corporation and the persons who compose it may in a proper case be cast aside and disregarded if it appears that the corporation is merely the business conduit through which an individual does business, and to recognize the separate entity of the

corporation would bring about a fraud upon third parties—here creditors—and a distribution of the bankrupt's assets to include the real debtors—the officers and stockholders.

Sell v. United States, 336 F. 2d 467, 472 (C.A. 10)

From the record, created by the claimants, scant as it is, it clearly appears the bankrupt corporation was but the instrumentality of the individual officers and stockholders. To treat the corporate entity separate from these individuals, the claimants, would result in injustice to the bankrupt's creditors. Flagrant disregard of corporate forms and the commingling of assets and functions by the bankrupt and its sole officers and stockholders was demonstrated. The corporate veil should be pierced. The Bankruptcy Court failed to consider this critical issue. The corporate veil may be pierced without finding the corporation was organized to defraud or hinder creditors.

Soviero, Trustee v. The Franklin National Bank of Long Island, 328 F. 2d 446, 448, 449 (C.A. 2)

Only by ignoring the corporate entity in this case, could then "all creditors receive that equality of treatment which is the purpose of the Bankruptcy Act to afford."

Stone v. Eacho, 127 F. 2d 284, 288 (C.A. 4) cert. denied 317 U. S. 635, 63 S. Ct. 54, 87 L. Ed. 512.

The lower court disregarded the inept attempt by the bankrupt's president to disclaim knowledge of the insolvency of the bankrupt at a time when it was paying loans for which the pursestring holders were personally responsible while not paying outside creditors.

This witness admits loans were made to "keep" the corporation "going". (44a, 46a) ". . . we put this money into the company which kept it solvent." (58a)

The decisions are uniform that even as to a third party knowledge of insolvency is not necessary, nor even actual belief thereof; all that is required is reasonable cause to

believe that the debtor was insolvent at the time of the preferential transfer. "A creditor has reasonable cause to believe that a debtor is insolvent when such a state of facts is brought to the creditor's notice, respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business person to the conclusion that the debtor is insolvent. 3 Collier on Bankruptcy, Sec. 60.53(1) at 1057-58 * * ."

Kravetz v. Joange Building Corp., 341 F. 2d 561, 563 (C.A. 2, 1965)

Clower, Trustee v. First State Bank of San Diego, Texas, 343 F. 2d 808, 809, 810, 811 (C.A. 5, 1965)

What, then, of the president of the bankrupt corporation's statement of lack of knowledge of insolvency? Particularly when he states the loans that were repaid were made to keep the company "going * * which kept it solvent"? And these preferential payments were made to the insiders, the officers and stockholders. Still the court below, holding preferential payments were made in these transactions, denied itself jurisdiction to pass upon that question.

In permitting such a determination a conflict in the decisions of this Court and of other circuits is created. The Third Circuit, in so doing, has drastically departed from the accepted and usual course of judicial proceedings. It is submitted it has sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. (Rule 19(1)(b) of the Supreme Court of the United States, 1954, as amended through June, 1964)

This same result was reached in allowing each of the opposed proofs of claim, without the claimants meeting their burdens of proof as fiduciaries of the bankrupt corporation. Too, in finding proof of the claims in a statement not in the record, in hearsay evidence, based upon unsworn' statements, not subject to cross-examination.

Priority of payment of claims under the Bankruptcy Laws are strictly controlled by the Bankruptcy Act, Sec.

64, 11 U.S.C.A., Sec. 104. A distraint for non-payment of rent is in an entirely different category than a priority or charge for rent existing under state law. It is not to be considered as a priority of payments, as falling within the purview of Sec. 104, Sub. (a) (5) of the Bankruptcy Act providing for priority for rent accrued within three months before the date of bankruptcy if the lessee is entitled to priority by applicable state law.

The alleged distraint did not meet the requirements of priority under State law. There was no evidence or statement of when such a levy for rent was made, what assets were levied on, their value or what was realized from the sale of such distrained assets. Here, too, was there a departure from the mandate of the Bankruptcy Law and from decisional law.

In re Goldstein, 34 F. Supp. 876, 46 A.B.R., N.S. 80

CONCLUSION

Wherefore, for the reasons stated hereinabove, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Philadelphia, Pa. 19102

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15368

In the Matter of CALPA PRODUCTS COMPANY,
BANKRUPT (Claim 76)

ROBERT C. GRASBERGER, TRUSTEE IN BANKRUPTCY and
RICHARD J. HILL, OBJECTING CREDITOR,
Appellants

No. 15369

In the Matter of CALPA PRODUCTS COMPANY,
BANKRUPT (Claim 77)

ROBERT C. GRASBERGER, TRUSTEE IN BANKRUPTCY and
RICHARD J. HILL, OBJECTING CREDITOR,
Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 6, 1965
Before KALODNER, *Chief Judge* and MARIS and FORMAN,
Circuit Judges

OPINION OF THE COURT

(Filed December 21, 1965)

PER CURIAM:

On review of the record we find no error. The Order of the District Court will be affirmed for the reasons so well stated in the Opinion of Judge Luongo.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.